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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1709

ARTHUR YOUNG & COMPANY and OTIS CHANDLER,
Petitioners,

vs.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, HONORABLE WILLIAM T. SWEIGERT, UNITED STATES SENIOR JUDGE PRESIDING; ALBERT A. KAUFMAN; JOE EBNER; JAMES HOWENSTINE; and THE 5-H INVESTMENT CLUB,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

FREDERICK P. FURTH,
THOMAS R. FAHRNER,
ROBERT C. CAGEN,
FURTH, FAHRNER & WONG,
Suite 1330, Russ Building,
235 Montgomery Street,
San Francisco, California 94104.

RICHARD G. WILSON,
ALLEN, WILSON, GEORGE
& EDGMON, INC.,
3728 Atlantic Avenue,
Long Beach, California 90807.

Counsel for Respondents.

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94105

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Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

The petitioners, Arthur Young & Company ("Arthur Young") and Otis Chandler ("Chandler") seek review of an order entered on March 4, 1977, pursuant to the unanimous decision of the United States Court of Appeals for the Ninth Circuit. That order denied petitioners' petition for a writ of mandamus

or prohibition, which sought to set aside an order certifying as class actions three closely related securities fraud actions. The class action certification order was entered on April 21, 1975, by the United States District Court for the Northern District of California.

Petitioners now claim that the class action order violates their Seventh Amendment right to a jury trial. This is the basis upon which the petitioners seek review of the District Court's class action certification order, and of the decision of the Court of Appeals upholding that order.

Respondent respectfully request that the petition be denied. The petition contains nothing which could possibly merit the Court's review of the class action certification order. The petitioners portray the class action order as a radical and unusual departure from the normal order entered in class action securities cases. On the contrary, the class action order is as sound, practicable, and time tested as any class action order is ever likely to be. Indeed, if petitioners' arguments were to be accepted here, Rule 23 of the Federal Rules of Civil Procedure would cease to exist except on paper.

Petitioners argue that the substantive law and the Seventh Amendment right to a trial by jury should not be "twisted" to comport with Rule 23. Respondents agree, although we strenuously disagree that any of petitioners' rights have been abrogated. On the other hand, it is also imperative that the Seventh Amendment right to a jury trial not be "twisted" and

tortured, as petitioners have done here, in a desperate attempt to avoid the class certification order.

OPINIONS BELOW

The unanimous opinion and order of the United States Court of Appeals for the Ninth Circuit is reported at 549 F.2d 686. The class action certification order entered by the United States District Court for the Northern District of California, not reported, appears in the appendix attached to the petition at pages A28 through A32.

JURISDICTION

Petitioners have invoked the provisions of 28 U.S.C. § 1254(1) in asserting jurisdiction.

QUESTION PRESENTED

Whether petitioners' convoluted and untenable interpretation of the Seventh Amendment right to a jury trial is adequate reason for this Court to review the class action certification order, which is interlocutory and by its terms subject to modification by the District Court as the litigation progresses, and which complies in all respects with Rule 23 as interpreted by this Court, by the District Court and by the Court of Appeals.

STATUTORY PROVISIONS

Respondents will discuss where applicable the constitutional and statutory provisions which petitioners invoke in their petition. These provisions are the Seventh Amendment to the United States Constitution, the Rules Enabling Act, 28 U.S.C. § 2072, and Rule 23, Rule 38(a), and Rule 42(h) of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

The petition relates to three separate but closely related securities fraud class actions. These actions are presently pending before the United States District Court for the Northern District of California. They have been consolidated for trial and have been certified as class actions. In each of the three suits, the plaintiffs charge defendants with violations of the federal securities law. The petitioners here are two of the defendants in those three actions. The plaintiffs in each of the three actions all purchased interests in oil and gas ventures. The three named plaintiffs and class representatives are Joe Ebner, James Howenstine, and Albert Kaufman, the real parties in interest and respondents to the petition. A brief description of each of the three cases is as follows below:

1. The Kaufman Action

The complaint in the *Kaufman* case was filed on August 14, 1972. Plaintiff Albert A. Kaufman brought the action on behalf of himself and all investors (a

class of approximately 1,215) who purchased interests in the GeoTek limited partnership oil and gas programs, against the corporations which sold the limited partnership interests, certain officers and directors of the corporations, and the corporations' independent outside creditors. Otis Chandler, one of the corporation's directors, and Arthur Young & Company, independent auditors for the corporation, were named in the complaint as defendants, and continue to remain as defendants in the *Kaufman* action.

The class members purchased interests in five separate GeoTek limited partnerships, each named for the year in which it was created:

GeoTek Resources Fund 1969-1, Ltd.
" " " 1970-1, "
" " " 1970-2, "
" " " 1971-1, "
" " " 1971-2, "

Participating interests in each of the GeoTek limited partnerships were sold pursuant to a registration statement filed in April, 1969 with the Securities and Exchange Commission, and declared effective on September 15, 1969.

The *Kaufman* plaintiffs charge that the GeoTek registration statement and prospectus, as periodically amended, contained material misstatements and omissions, and that the defendants are liable therefor under Sections 11, 12(2) and 17(a) of the Securities Act of 1933 (15 U.S.C. §§ 77k, 77(12) and 77q(a)), and Section 10(b) of the Securities Exchange Act of

1934 (15 U.S.C. § 78j(b)), and SEC Rule 10b-5 thereunder. While the *Kaufman* complaint also pleads claims for violations of the California Corporate Securities Law and common law fraud, plaintiffs have withdrawn these claims. The complaint also alleges certain oral misrepresentations. These allegations have likewise been withdrawn. Accordingly, the class action trial will be limited to the allegations of material misstatements and omissions in the GeoTek registration statement and prospectus, as amended.

2. The Ebner Action

The *Ebner* action was filed on February 1, 1973, and was brought on behalf of plaintiff Ebner and all other investors in one or more of four joint ventures known as the J. B. Oil Company 1964, 1965, 1966 and 1967 Oil Exploration Programs. A total of 319 persons invested in these four programs. Each investor received a standardized printed offering circular, signed a standard-form Oil Exploration Program Agreement, and received certain financial statements certified by petitioner Arthur Young, the independent outside auditor for the programs.

In the fall of 1969, Petroleum 2000 Corporation made an offer to all investors in the J. B. 1964 through 1967 Programs to exchange shares of its common stock for the investors' participation interests in the programs. This exchange offer was made by a printed offering circular distributed to all the investors. The requisite number of investors accepted the offer, and from early 1970 to the present, the members

of the *Ebner* class have been shareholders of Petroleum 2000 Corporation.

The *Ebner* complaint charges seven defendants, including petitioner Arthur Young and petitioner Chandler, with material misrepresentations and omissions in the J. B. Oil Program offering circulars, program agreements and financial statements, and in the offering circular distributed in connection with the Petroleum 2000 Corporation exchange offer. The *Ebner* action is based on Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5. Although certain oral misrepresentations are alleged in the complaint, these allegations have been withdrawn by the plaintiffs.

3. The Howenstine Action

The *Howenstine* action was filed on May 3, 1974. Plaintiffs James Howenstine and The 5-H Investment Club (an unincorporated association) brought the action in behalf of themselves and all other investors in a joint venture known as the J. B. Oil Company 1968 Oil Exploration Program. A total of 187 persons invested in the 1968 Program. Each investor received a standardized printed offering circular, signed a standard-form Oil Exploration Program Agreement, and received a financial statement certified by Arthur Young, the independent outside auditor for the program.

In the fall of 1970 Petroforce Corporation made an offer to all investors in the J. B. 1968 Program to exchange shares of its common stock for the investors'

participation interests in the program. The exchange offer was made by a printed circular distributed to all the investors. The requisite number of investors accepted the offer, and from early 1971 to the present, the members of the *Howenstine* class have been shareholders of Petroforce Corporation.

The *Howenstine* complaint charges eight defendants, including petitioner Arthur Young and petitioner Chandler, with material misrepresentations and omissions in the J. B. 1968 Program offering circular, the program agreement, the Arthur Young & Company financial statement, and in the offering circular distributed in connection with the Petroforce Corporation exchange offer, in violation of Section 10(b) of the Securities Exchange Act of 1934, and SEC Rule 10b-5. No oral misrepresentations are alleged in the *Howenstine* complaint.

In the District Court, plaintiffs moved for an order, pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure, certifying as class actions the *Ebner, Howenstine,* and *Kaufman* actions. Defendants, including the petitioners here, raised every conceivable argument in their vigorous opposition to class certification.

Few class action motions have been so thoroughly scrutinized by any court. The parties submitted voluminous briefs and substantial evidenciary materials in support of their positions. On at least three separate occasions, lengthy hearings were held before the District Court, during which the parties had a full opportunity to present evidence and argument.

On April 21, 1975 the District Court entered its order certifying the *Ebner, Howenstine* and *Kaufman* actions as class actions. Petitioners immediately filed a petition for a writ of mandamus with the United States Court of Appeals for the Ninth Circuit, seeking to vacate and set aside the District Court's class action certification order. While the petition was pending before the Court of Appeals, that tribunal issued an order staying all proceedings before the District Court.

In the Court of Appeals, all parties were once again given a full opportunity to brief and orally argue their positions. On March 4, 1977, the Court of Appeals denied the petition, vacated the stay, and remanded the *Ebner, Howenstine* and *Kaufman* actions to the District Court for further proceedings.

Upon remand, some of the parties brought motions for summary judgment in each of the three class actions. These motions have been argued, and have been taken under submission by the District Court. No date has been set for trial in any of the three actions. Nor have any class notices been mailed.

By means of the present petition, petitioners once again seek interlocutory review of a class action order already scrutinized and re-scrutinized by the District Court and by the Court of Appeals.

We respectfully request that this Court now refuse any further review of the class action certification order entered by the District Court. The order has already withstood intense judicial analysis by two Courts. It is simply contrary to all notions of judi-

cial efficiency to now apply, while the three cases are at an interlocutory stage, a third tribunal's analysis to an already microscopically examined class action certification order. Most importantly, the class action order is entirely appropriate and does not abrogate any of petitioners' rights, Petitioners' argument to the contrary should be rejected.

ARGUMENT

THE CONTROVERSY HERE IS NOT RIPE FOR REVIEW BY THE SUPREME COURT

Judicial efficiency and the need for prompt disposition of these cases in the District Court strongly militates against granting the petition for a writ of certiorari. Indeed, Rule 20 of the Rules of the Supreme Court of the United States compels a denial of review of the class action certification order at this time.

The *Ebner, Howenstine* and *Kaufman* actions are still pending before the District Court. Judgment has not been entered in any of these cases. In fact, no trial date has even been set in any of the three cases. Yet the petitioners now request this Court to bypass the normal appellate procedure.

Rule 20 precludes petitioners from "short-cutting" the normal appellate procedure, unless they can demonstrate ". . . that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settle-

ment in this court . . ."[1] Rule 20 of Rules of the Supreme Court of the United States.

Respondents respectfully submit that the petitioners have fallen far short of making the showing a need for immediate review by this Court. Indeed, the issue here is simply the propriety of an ordinary, interlocutory class action order entered by a District Court pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure. Although petitioners have exerted herculean efforts in an attempt to inject constitutional issues into the certification of the class action order, the fact remains that the issue here on appeal is not of "such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court." If petitioners are now permitted to bypass the normal appellate procedure, this Court's docket may well become inundated with premature appeals alleging purported "Seventh Amendment issues" each time a District Court certifies a case as a class action.

The cases in which this Court has permitted an appeal, before judgment is given in the Court of Appeals, are clearly and unmistakably ones of "imperative public importance". *E.g.,* See *United States v. Nixon,* 418 U.S. 683 (1974), and *New Haven Inclu-*

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[1]We recognize that Rule 20 literally speaks to cases "pending in a court of appeals". However, the principle underlying the Rule should apply with at least equal force to cases still pending before the District Court. The policy upon which Rule 20 is based is to foster judicial efficiency and expediency, and to insure that the court dockets are not clogged with interlocutory appeals. These salutary considerations are undeniably present in the instant case.

sion Cases, 399 U.S. 392 (1970). In both of these cases, there were issues so important to the entire nation as to transcend the otherwise strict policy of rejecting premature appeals. In the *Nixon* case, for example, the Supreme Court granted certiorari before judgment in a criminal case in which seven indictments had been returned against members of the executive branch of the government and the Committee for the Re-election of the President, and in which the President of the United States had been named as an unindicted co-conspirator. In such a case, there is an obvious and urgent need for immediate review by the Supreme Court. In *Nixon,* the normal functioning of the executive branch of the government—clearly of imperative importance to the entire nation—depended upon a speedy disposition of the issues raised in the petition for certiorari made to the Supreme Court.

Here, no such factors exist to compel interference with the normal appellate procedure. The propriety of the class action order certifying the *Ebner, Howenstine,* and *Kaufman* actions, is not a burning issue of "imperative public importance" which cries out for immediate disposition by this Court. In fact, the issues presented in the petition are of imperative importance primarily to the petitioners, and to no one else. The petition does nothing to show otherwise.

This Court has long refused to grant certiorari over interlocutory orders. Except in extraordinary circumstances, only a final decree will be reviewed by the Court:

> "Whether an interlocutory order may be separately reviewed by the appellate court in the progress of the suit, or only after and together with the final decree, is matter of procedure rather than of substantial right; and many orders made in the progress of a suit become quite unimportant by reason of the final result, or of intervening matters. Clearly, therefore, this court should not issue a writ of certiorari to review a decree of the circuit court of appeals or appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co. v. Jacksonville, T. & K. W. R. Co.,* 148 U.S. 372, 384 (1892).

The same considerations of judicial economy noted in *American Construction* are applicable here. The class action certification order may become "quite unimportant by reason of the final result, or of intervening matters." If, for example, petitioners prevail in their defense on the merits before the District Court, the class action certification order would be of no concern to the petitioners.

A premature invocation of the appellate process here would present a grave danger of interfering with the proceedings now being held before the District Court. For example, the class action notices have not yet been mailed to class members. At a recent status conference held before the District Court, the petitioners' attorneys urged the Court to further stay the mailing of the notices, on the ground that petitioners are now asking that the Supreme Court

review, by means of a writ of certiorari, the propriety of the class action certification order. That petitioners are able, over two and one half years after these cases were certified as class actions, to point to possible Supreme Court review of these orders as a reason for staying the mailing of class notices, can only result in further delay of cases which have already suffered far too much from that malady. Only by promptly denying petitioners' writ may this Court insure that the proceedings before the District Court go forward, and be terminated, in an expeditious manner.

If orderly appellate procedures are to be the rule of our judicial system, and if chaos and impossibly overcrowded dockets are to be denied free rein therein, this Court must deny the petition as premature.

THE CLASS ACTION CERTIFICATION ORDER DOES NOT ABROGATE PETITIONERS' SEVENTH AMENDMENT RIGHT TO A JURY TRIAL.

The class action order entered by the District Court provides for trial on the "common" issues first, excluding from the fact-triers consideration, at that time, any so-called "individual issues":

> "(a) As to issues of liability of general application, excluding the following issues: reliance or causation, duty owed to the individual claimant insofar as it may vary depending upon the status of that claimant, knowledge of the claimant investor as to facts allegedly misrepresented or omitted, statute of limitations, laches, waiver, estoppel, ratification, unclean hands and pari delicto;
>
> "(b) As to the issue of damages only to the extent of determining the value of the interests received by investors, together with loss of profits, if any, within the meaning of California Civil Code Section 3343, up to the time of trial."

As provided in the same order, any "individual issues" will be tried within 90 days after notice to the class members of a decree or judgment, if such decree or judgment is in favor of plaintiffs:

> "6. As to all issues excluded from class action maintenance herein, said excluded issues will be reversed for future determination upon individual claims filed hereunder by any member of the classes as above set forth, such claims to be made within 90 days after notice of such class members of the decree or judgment herein, if such decree or judgment in favor of plaintiffs."

The class action order, then, provides for a trial which is bifurcated between those issues which are common to all class members, and those issues, if any, which are individual to the class members. The Court of Appeals praised the District Court's class action certification order as "novel" and "innovative". Petitioners have seized upon the Court's use of these terms, in an attempt to make the order appear as a grotesque and radical departure from any order which could possibly be entered by a court enforcing the laws of a civilized nation.

With all due respect to the Court of Appeals, the Order entered by the District Court is neither novel

nor innovative. Instead, the order is a practicable, sound, and time-tested method of dealing with class action trials. Not only is bifurcation of issues at trial expressly permitted by Rules 23 and 42 of the Federal Rules of Civil Procedure, but the courts have actually entered class action certification orders which provide for bifurcation of issues:

> "We see no sound reason why the trial court, if it determines individual reliance is an essential element of the proof, cannot order separate trials on that particular issue, as on the question of damages, if necessary. The effective administration of 23(b) (3) will often require the use of the 'sensible device' of split trials. *Green v. Wolf Corp.*, 406 F.2d 291, 301 (2d Cir. 1968).
>
> * * *
>
> "Defendants have pleaded additional defenses of estoppel, waiver, release and the statute of limitations. The first three apply, if at all, only to certain plaintiffs, not to every one. These issues, therefore, are also deferred.
>
> "I will treat the defense of the statute of limitations in the same way. This may depend to some extent upon the knowledge of individual plaintiffs. Therefore, the question can more readily be determined when the evidence with respect to each separate plaintiff is reviewed." *Escott v. Bar Chris Construction Corp.*, 283 F. Supp. 643, 704 (S.D.N.Y. 1968).

As the late Judge Frankel observed, the "split trial" procedure is a preferable, and sometimes required, method of dealing with class actions:

> "In the cases to which I refer, assertedly under (b)(3)—i.e., having both common issues and issues affecting separately the individual members of the class—district judges have apparently thought that all members of the class would have to be brought before the court—for discovery as well as trial—before there could be any judgment affecting the class as a whole. Insofar as this premise lurks in the cited cases, it would appear to be unwarranted. Take, for example, the simple model of the case by an alleged class of securities purchasers charging fraudulent representations. There are, supposedly, common questions as to the nature of the alleged representations, falsity, and materiality. If some or all such questions are decided against the plaintiff class, the complaint will be dismissed and, always assuming adequate representation of the class, there will be a judgment binding the class without requiring any but the representative members to have been before the court.
>
> "On the other hand, if the plaintiff class prevails on the common questions, it will then—but only then—become necessary to try or settle or otherwise dispose of individual questions like reliance, damages, or the like. If the common questions have been aptly defined, there should be no need at an earlier stage to have all the individual class members before the court for discovery or any other purpose.
>
> "In other words, the effective administration of (b)(3) actions will probably require wide use of the already familiar device of split trials. And I submit that a lively awareness of this sensible device should serve to postpone or minimize some

of the excessively frightening complications that seem overwhelming from a threshold view of the case." Frankel, *Some Preliminary Observation Concerning Civil Rule 23,* 43 F.R.D. 39, 47 (1966).

The above-quoted authorities make it clear, then, that "split trials" are a useful and widely accepted tool for simplifying class action trials.

Petitioners make three main arguments in support of their contention that the order violates their Seventh Amendment right to a jury trial. *First,* they contend that there exist substantial numbers of issues individual to each member of the class. *Second,* they contend that these issues are so "inextricably intertwined" with issues common to all members of the class as to require, as a matter of law, that the same jury which acts as fact-finder on the common issues must also do so with respect to the individual issues. *Third,* petitioners claim that it would be impossible for the same jury to hear both the individual and the common issues, and that the class action order is therefore violative of petitioners' constitutional right to a trial by jury.

None of these arguments has merit. If Rule 23 is to have a continued meaningful existence, petitioners' tortured analysis of the right to a jury trial, and of the relationship of this right to Rule 23, must be summarily rejected by this Court.

THE DISTRICT COURT'S BIFURCATION OF ISSUES IN THE CLASS ACTION ORDER DOES NOT MEAN THAT THE COURT HAS RECOGNIZED THE EXISTENCE OF NON-COMMON ISSUES.

Petitioners contend that their Seventh Amendment right to a jury trial is abrogated by the bifurcation of common and individual issues. This contention is based, of course, upon the assumption that there are substantial numbers of individual issues to be tried in the *Ebner, Howenstine* and *Kaufman* cases. This assumption is incorrect.

The petitioners have long contended, to both the District Court and the Court of Appeals, that the three class actions abound with individual issues. Petitioners' purpose in so contending, of course, was to persuade these tribunals that common questions of law and fact do not predominate over individual questions, and hence that the plaintiffs had not met the prerequisites of Rule 23(b)(3). However, while petitioners have spent much effort in contending that individual issues exist in great multitudes, they have never seen fit to actually present evidence in support of their contention.[2] The petition is a prime example of petitioners' willingness to assert the existence of individual issues, but their unwillingness to present

[2]By contrast, respondents presented to both the District Court and the Court of Appeals abundant evidence to demonstrate that the issues in these cases are common to the class members. Among the evidence introduced by the respondents were the GeoTek registration statement and prospectuses, the J. B. Oil Company offering circulars, the J. B. Oil Company financial statements, the J. B. Oil Company Program Agreements, the Petroleum-2000 offering circular, and the Petroforce offering circular. These are all identically worded documents which were sent to each class member.

anything to the Court to support that assertion. For example, on page 24 of their petition, the petitioners point to a number of so-called individual issues, including the "defenses of waiver, estoppel, laches, ratification, unclean hands, statutes of limitations, and *pari delicto*", Petition page 24. However, nowhere in the record before this Court, or any other court, is there evidence that anything in this impressive parade of "defenses" bars the claims made by any of the class members. Petitioners evidently wish this Court to accept, as an act of faith, their assertion that "substantial numbers of the purported investor-class are subject to [individual] defenses . . ." Petition page 24.

Petitioners contend that "The District Court correctly recognized the substantial nature of non-common issues raised by this evidence and that the three actions could not possibly proceed as class actions upon these issues" Petition page 10. This statement is simply incorrect; the District Court has never ruled that non-common issues are substantial, or even that they exist at all. This is clear from the face of class action certification order:

> "4. In reserving issues for later determination, the Court does not intend to rule upon either the legal or factual sufficiency or necessity of such issues." Appendix to Petition, page A31.

The Court of Appeals, in its decision, expressly noted that petitioners had failed to show that individual issues did in fact exist to any substantial degree:

> "Another issue reserved for later determination by the district court's order concerns the amount of information which any particular claimant had or learned about the J. B. Ventures, the GeoTek partnerships, or any of the related corporations, either at the time of the purchase of interests or at some later date prior to the time of fraud perpetrated by Burke and others was disclosed to the public. Evidence of such knowledge, say the petitioners, in [sic] relevant to their basic defenses, of non-reliance and to such other defenses as waiver, estoppel, laches, and statute of limitations. To the extent these issues are not common to the classes, see note 10, supra, we do not think the district judge erred simply by separating them out for individual adjudication at the close of the class trial. The petitioners have again failed to demonstrate that the existence of this issue is so prevalent among the claimants that they will present much proof on the issue at the later trial. Absent such a showing, we deem it entirely appropriate for the district judge to separate out those issues for later adjudication with respect to the relatively few claims to which they are pertinent." Appendix to Petition, page A21.

Petitioners raise the specter of these "individual" non-issues in a transparent and desperate attempt to portray the *Ebner, Howenstine,* and *Kaufman* actions as extraordinarily complex actions, in which it will be necessary at trial for petitioners to examine hundreds or thousands of investors, in order to properly determine whether such investors are subject to defenses such as *pari delicto.* Petitioners have totally failed to show the existence of "individual" issues applicable

to substantial numbers of the class. On that basis alone, the Court should deny the petition.

UNCONTRADICTED AUTHORITY SANCTIONS THE "SPLIT TRIAL" DEVICE ORDERED HERE BY THE DISTRICT COURT.

Petitioners contend that, under the Seventh Amendment, they have an absolute right to a "unitary" jury trial. According to petitioners, the Seventh Amendment right to a jury trial will be abrogated unless all issues, whether common or individual, are tried by one jury at a single hearing.

Clearly, petitioners are entitled to a jury trial under the Seventh Amendment. Respondents have no quarrel with that proposition. It is petitioners' extraordinarily convoluted interpretation of the Seventh Amendment to which respondents take complete exception.

The text of the Seventh Amendment itself does not prohibit the submission of separate issues in the same case before different juries. Neither does the amendment explicitly require that all issues be submitted to a jury at "a single hearing" (petition page 17).

Rule 42(b) of the Federal Rules of Civil Procedure specifically authorizes district courts to order separate trials on "separate issues":

> "(b) SEPARATE TRIALS. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, *or of any separate issue* or of any number of claims, cross-claims, counterclaims, or third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States." Fed. Rules Civ. Proc. 42(b) (emphasis added).

The leading case of *Gasoline Products Co. v. Chamlin Refining,* 283 U.S. 494 (1931), makes it clear that the right to a trial by jury does not preclude courts from employing innovative methods of effectuating that right:

> "All of vital significance in trial by jury is that issues of fact be submitted for determination with such instructions and guidance by the court as will afford opportunity for that consideration by the jury which was secured by the rules governing trials at common law. [Citations omitted]. Beyond this, the Seventh Amendment does not exact the retention of old forms of procedure." 283 U.S. at 498 (1931).

As Justice Brandeis stated in the *Matter of Walter Peterson,* 253 U.S. 300 (1920):

> "New devices may be used to adapt the ancient institution [the jury trial] to present needs and to make of it an efficient instrument in the administration of justice. Indeed, such changes are essential to the preservation of the right. The limitation imposed by the Amendment is merely that enjoyment of the right of trial by jury be not obstructed, and that the ultimate determination of issues of fact by the jury be not interfered with." 253 U.S. 300, 310.

Petitioners claim that the Seventh Amendment requires that all issues be presented to the trier of fact at a single hearing. The rationale behind this claim is not evident to respondents. The courts have repeatedly held that the Seventh Amendment does not require that all issues be submitted to the trier of fact during a single hearing. The case of *Hosie v. Chicago Western Railway Company,* 282 F.2d 639 (7th Cir. 1960), cert. den. 365 U.S. 814, squarely ruled that issues need not be submitted to the trier of fact at a single hearing:

> "There remains for consideration the very important question of whether plaintiff was deprived of a jury trial in violation of the Seventh Amendment of the Constitution of the United States when the trial court *sua sponte* and over the objection of plaintiff, ordered the case to proceed to trial solely on the issue of liability.
>
> "We hold that in the trial of the instant case, the essential character of a trial by jury was preserved. In our view, the Seventh Amendment does not require the retention of all the old forms of procedure; nor does it prohibit the introduction of new methods for ascertaining what facts are in issue. See Gasoline Products Co. Inc. v. Champlin Refining Co., 283 U.S. 494, 497-498, 51 S.Ct. 513, 75 L.Ed. 1188.
>
> * * *
>
> "Many of the federal district courts of this country are laboring under the heavy burden of crowded trial dockets. The Northern District of Illinois is no exception. The judges of that court should be commended for their search for methods and means to expedite the disposition of cases

> upon their calendars. There is no doubt that in numerous cases, the severing of the issue of liability from the issue of damages will result in the shortening of the time of trial. The instant case is a good example. Without such severance, hours or even a day or two might have been consumed on the issue of damages." 282 F.2d 639, 642-643.

Professor Wright has made the following observation:

> "There is no doubt that the court can order separate trials of issues, with the same jury sitting in each trial, and it seems to be accepted that the better and preferred practice is to use the same jury for all issues, even though it may hear the issues at different times. The issue can thus be narrowed to whether the admittedly preferred procedure is consitutionally required. It has been held, on sound ground, that the Seventh Amendment is not violated by the separate submission of the issues to a single jury." *Federal Courts,* 1963 Ed. Charles Alan Wright, page 378 (citations omitted).

Petitioners also contend that the same jury which decides the common issues must also decide the individual issues. Petitioners claim, in an effort to convince the Court that certiorari is appropriate here, that the lower courts which have attempted to deal with this issue need guidance because of "the unsettled and contradictory opinions of judges of the Courts of Appeals . . ." Petition page 15.

Contrary to petitioners' assertions, the lower courts are not in the least "confused" by the issues presented

here. They have uniformly ruled that the Seventh Amendment does not require all issues to be decided by one jury.

The courts have often ordered bifurcation between liability and damage issues at trial. Inevitably, Seventh Amendment issues have been raised in some of these cases. In the leading case of *O'Donnell v. Watson Bros. Transportation Co.,* 183 F.Supp. 577 (N.D. Ill. 1960), the Court upheld the constitutionality of its local rule authorizing separate trials, *by different juries,* of the liability and damage issues in civil cases:

> "The Rule provides that the trial judge may, in his discretion, order one jury to decide upon the liability of the defendant and the same or another jury to determine the damages of the plaintiffs. The judge may recess after a decision of guilty on liability for pre-trial or settlement conference or proceed with the trial. The right to a trial by jury does not require that all issues be determined by the same jury and severance of the issues is not violative of any constitutional guarantee." 183 F.Supp. 585.

Similarly, in *Swofford v. B & W, Inc.,* 34 F.R.D. 15 (S.D. Tex. 1963), *aff'd* 336 F.2d 406 (5th Cir. 1964), *cert. denied* 379 U.S. 962, it was held that issues of liability and damages could be tried before different juries without encroachment upon the Seventh Amendment guarantee:

> "[P]laintiffs suggest that to try the issues of liability and damages to separate juries, requisite in this case if separate trials should be ordered,

> would be a deprivation of jury trial as contemplated by the Seventh Amendment. Although the question has not yet been authoritatively settled, the Court feels that there is no violation of the Seventh Amendment by a separate submission of issues to separate juries under proper circumstances." 34 F.R.D. at 20.

The issue of whether bifurcated trials violate a party's right to a jury trial has also been raised by defendants in other class action cases in vain attempts to avoid class certification. In the case of *Link v. Mercedes-Benz of N. Am., Inc.,* 550 F.2d 860 (3rd Cir. 1977), *cert. den.,* 45 U.S.L.W. 3762, the Court relied on *Gasoline Products* in rejecting an argument identical to the one which petitioners make here:

> "The legal issue which is inextricable from the merits of the district court's class action determination arises from the demand by defendants for a unitary jury trial of the § 4 Clayton Act damage claim. In making that demand the defendants rely upon the Seventh Amendment which, they urge, guarantees a trial before a single jury rather than separate juries as contemplated by the district court. But defendants somewhat overstate the reach of that Amendment. In the seminal case, Gasoline Products v. Champlin Refining Co., 283 U.S. 494, 51 S.Ct. 513, 75 L.Ed. 1188 (1931), the Supreme Court held that the Seventh Amendment right to jury trial is not abrogated when an appellate court orders a new trial only on one of the issues originally tried before a unitary jury in the court below. The Court reasoned that the Seventh Amend-

ment guaranteed a unitary jury trial only of issues, not of cases:

* * *

"Gasoline Products does not suggest that its distinction between issues as opposed to cases is limited to retrials, and given the analysis which the Court made, no Seventh Amendment policy suggests such a limitation. Thus, I agree with the Fifth and Tenth Circuits, and with the commentators, that the Seventh Amendment guarantees a unitary trial of issues, not of cases, even in the first instance." 550 F.2d 860, 874-875.

See also the discussion of the interaction between bifurcated trials and the Seventh Amendment in the case of *State of Alabama v. Blue Bird Body Co., Inc.*, 71 F.R.D. 606 at 613-615 (M.D. Ala. 1976). The Court there concluded that bifurcation of issues did not preclude class certification by virtue of the Seventh Amendment:

"On the basis of the foregoing reasoning and its conclusion that the issues of liability and damages in this action are separable and distinct, this Court holds, while recognizing that the matter is not free from doubt, that Defendants' right to a jury trial would not be violated by trials by separate juries of these two issues. The Court, therefore, finds that a class action would be a superior means of proceeding with this litigation as required by Rule 23(b)(3)." 71 F.R.D. 606, 615.

The lower courts, then, have consistently followed the principles enunciated in *Gasoline Products* in holding that bifurcated trials, decided by more than one jury, are not violative of the Seventh Amendment. In view of the lower courts' consistent adherence to these principles, it is difficult to understand how the granting of certiorari would provide valuable guidance to the lower courts.

It is true that submission of different issues to different juries may be impermissible in some circumstances. According to the opinion in *Gasoline Products* (followed in *United Air Lines v. Wiener*, 286 F.2d 302 (9th Cir. 1961), cert. den., 366 U.S. 924), separate juries may decide separate issues only if those issues are "so distinct and separable" from one another that separate trials "may be had without injustice." 286 F.2d 302, 306. Or, as further stated in the *United Air Lines* opinion, the question turns on whether one issue is "so interwoven" with a second issue that "the former cannot be submitted to the jury independently of the latter without confusion and uncertainty which would amount to a denial of a fair trial." 286 F.2d 302, 306.

Petitioners assert that the individual issues are "so interwoven" with the common issues as to require that one jury decide both the common and the individual issues. On pages 21 through 25 of the petition, the petitioners purportedly "analyze" the individual issues, in an attempt to show that the individual issues are inextricably interwoven with the common issues. The effort is unavailing. Only by indulging in complete fantasy, could one conclude that the individual issues are inextricably interwoven with the common issues. As we will demonstrate

below, the individual issues, if any, are separate and distinct from the common issues.

Petitioners claim that four groups of individual issues are inextricably intertwined with the common issues. These groups of issues are described as follows:

(1) Whether the communications to investors were misleading (petition p. 21);

(2) Whether the investor relied on the misleading communications (petition p. 22);

(3) Whether the class members are barred by the defenses of estoppel, laches, clean hands, statutes of limitations, and *pari delicto* (petition p. 24);

(4) Whether each class member suffered any damage, and if so, how much (petition p. 25).

The Court of Appeals concluded that these "issues" do not exist to any substantial degree, and the petition here does nothing to demonstrate that this conclusion was erroneous. However, even if it is assumed that these defenses are applicable to a substantial number of class members, such defenses are not "inextricably intertwined" with the common issues. The petitioners do not show otherwise, nor could they ever make such a showing.

The petitioners claim that the issue of whether a particular written communication is misleading is not separate and distinct from the common issues, and therefore must be tried before the same jury which

also decides the common issues. This argument is totally devoid of merit for at least two reasons. *First,* the class action certification order does not reserve for later determination the issue of whether the communications were misleading. This is an issue common to the class which will be tried during the first phase of the trial. *Second,* this issue is separate from other issues in the case. Petitioners claim that:

> "In determining whether communications to an investor were misleading, the trier of fact must analyze all of the contemporary oral and written communications in their totality, rather than focusing upon only one such communication, and must consider the sophistication, motivations and actual knowledge of each investor, derived from sources other than the black and white of a prospectus, at least here where direct personal sales, entailing numerous oral communications by salesmen, sophisticated investors and their advisors, are involved, not broad, impersonal securities market transactions." Petition page 22.

Petitioners have often employed this argument, always unsuccessfully, in order to convince the District Court and the Court of Appeals that class certification would result in the "necessity" for thousands of "mini trials." In particular, petitioners claim that evidence of oral statements made to the investors influences the question of whether a written communication is misleading. This is simply not the law. *Igenito v. Bermac Corp.,* 376 F.Supp. 1154 (S.D. N.Y. 1974) exposes the fallacy of petitioners' argument:

> "Since, as we have noted, reliance on the prospectus need not be proven at trial, it is immaterial whether other, possibly non-misleading, representations were made to the post-prospectus herdowners in the course of the sales presentation. Proof that the prospectus was materially misleading, and that defendants acted with the requisite scienter . . . is enough to establish liability, even if plaintiffs bought solely on a tip from the man in the moon." 376 F.Supp. at 1169.

The argument that reliance is inextricably intertwined with other issues is equally specious. Under this Court's decision in *Affiliated Ute Citizens v. United States,* 406 U.S. 128 (1972), reliance is not an element of a Rule 10b-5 claim:

> "Under the circumstances of this case, involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of [his investment] decision [citations omitted]. *This obligation to disclose and this withholding of a material fact establish the requisite element of causation in fact.*" 406 U.S. 153-154 (emphasis added).

As to the third so-called group of "individual issues"—estoppel, laches, ratification, unclean hands, statutes of limitations, and *pari delicto*—petitioners have totally failed to show that they are inextricably intertwined with any common issues. Petitioners merely make the gratuitous claim, backed up by no

facts or law, that "the resolution of such issues cannot be accomplished rationally without considering the total circumstances involved". Petition page 25.

Lastly, petitioners claim that damage issues are somehow inseparable from the common issues. Here again petitioners point to "the totality of the circumstances applicable to each investor," (petition page 25), including the "tax benefits" which each class member supposedly received from his investment. However, it has long been settled that tax savings which a plaintiff realizes as a result of a defendant's wrongdoing are not to be considered in calculating damages. *See, e.g., Cereal Byproducts Co. v. Hall,* 16 Ill.App.2d 79, 147 N.E.2d 383 (1958); *Hanover Shoe, Inc. v. United Shoe Mach. Corp.,* 392 U.S. 481, 503 (1968); *Rhode v. Hershberger Explorations Inc.,* 349 F.Supp. 993, 994 (D.Minn. 1972).

The separability of these issues stands in sharp contrast to the inseparable issues in *United Airlines, Inc. v. Wiener, supra.* In the *United* case, the Court held that the same jury which had decided liability must also decide the amount of punitive damages to be awarded. Without doubt, punitive damages are inextricably intertwined with liability issues. The amount of punitive damages which a jury may award is dependent on various factors, such as the presence or absence of malice and the degree of the outrageous nature of the defendant's acts. These damage issues are also issues which must be proven during the liability phase of the case. Petitioners' attempt to fit the three class actions into the *United* mold is un-

availing; the facts are simply not similar to those in *United.*

The Court of Appeals concluded, after reviewing all the evidence which was before the District Court, that the individual issues were separable from the common issues. We respectfully submit that this was the only conclusion which the Court could have properly reached. This Court should not now review that decision.

THERE IS NOTHING IN THE CLASS ACTION CERTIFICATION WHICH PRECLUDES THE SAME JURY FROM DECIDING BOTH THE COMMON ISSUES AND THE INDIVIDUAL ISSUES.

Even if it is assumed that there are individual issues to be tried, and even if it is assumed that these issues must be tried before the same jury which decides the common issues, the class action certification order does not abrogate petitioners' Seventh Amendment right to a jury trial. There is no reason why one jury could not decide both the common issues and the individual issues as well. The class action certification order does not require that one jury decide the common issues, and another jury the individual issues. The class action certification order is silent on this point.

It is premature, to say the least, for the petitioners to complain of a contingency which may never occur. As the Court of Appeals stated in its opinion:

> "Petitioners characterize as 'disingenuous' the suggestion that trial of all issues in these cases will be had before one jury. There is nothing in

> the district court order that would preclude such a procedure, as a practical matter, and we find nothing inherently wrong with such a procedure. It may be that the district court does not contemplate this procedure, but it would be presumptuous of us to assume the district court's intention in this regard." 549 F.2d 686, 693, footnote 9.

In the case of *Link v. Mercedes-Benz of N. Am., Inc.,* 550 F.2d 860 (3rd Cir. 1977), *cert. den.,* 45 U.S. L.W. 3762, the Court also dealt with an argument almost identical to that raised by the petitioners here. In *Link*, the Court stated as follows:

> "The second question certified by the district court is the propriety of having separate juries for each segment of the bifurcated trial. The court, however, entered no order directing separate juries and whether it will is a matter of pure speculation at this juncture." 550 F.2d 860, 864.

In the case of *In Re Master Key Antitrust Litigation*, 528 F.2d 5 (2nd Cir. 1975), the Court of Appeals refused to vacate a class action certification order entered by the District Court. The Court responded as follows to petitioners' arguments that bifurcation was offensive to the Seventh Amendment:

> "It would plainly be premature for us to rule on the appropriateness of using two juries where only one, in fact, may be involved. We should only note that bifurcated trials have frequently been employed with great success." 528 F.2d 5, 15 (citations omitted).

Petitioners claim that as a practical matter, one jury could not possibly decide both the common and the individual issues, because by the terms of the class certification order, there is at least a 90-day lapse of time between the trial of the common issues and the trial, if any, of the individual issues. There are two simple answers to this contention.

First, a 90-day lapse between the trial of the common and the individual issues does not necessarily preclude one jury from deciding issues presented during both phases of the trial. One jury could well decide one particular phase of a case, and then return 90 days later and decide the remaining issues. *Second*, if the District Court decides that a 90-day interval between the two phases of the trial is excessive, the Court may modify its class action certification order to provide for a shorter time interval. Here, as with all class actions, the District Court has the power to modify the class action certification order if such modification is warranted. Because of the flexibility which the Court has in altering class action orders, the petitioners can easily move before the District Court for a shortening of the 90-day interval set forth in the District Court's order, rather than making matters of this nature the subject of a petition for a writ of certiorari.

THE COURT OF APPEALS DID NOT ADOPT AN INCORRECT STANDARD FOR REVIEW OF THE DISTRICT COURT'S ORDERS.

Petitioners also argue that the Court of Appeals adopted an incorrect standard for review by mandamus. This argument is based on the premise that the petitioners' Seventh Amendment rights have been abrogated, and that therefore the Court must employ a standard of review by mandamus less stringent than "clear and indisputable error." The premise itself, though, is inaccurate; the petitioners' right to a jury trial has not been abrogated. Neither do any of the authorities cited by petitioners hold that a more liberal standard of review on mandamus must be employed whenever a party claims that his right to a jury trial has been abrogated. We submit that the weak showing made by the petitioners both here and before the Court of Appeals is insufficient reason to deviate from the normal standards of mandamus review.

CONCLUSION

It may be true, as petitioners contend, that the substantive law has sometimes been altered to permit class certification. If this is an abuse which this Court should not tolerate, it is equally important that this Court reject petitioners' arguments based on a

Seventh Amendment which has been tortured into unrecognizable form in order to avoid class certification. We respectfully submit that the petition is premature and totally lacks merit, and should be denied by this Court.

FREDERICK P. FURTH,
THOMAS R. FAHRNER,
ROBERT C. CAGEN,
FURTH, FAHRNER & WONG,
Suite 1330, Russ Building,
235 Montgomery Street,
San Francisco, California 94104,

RICHARD G. WILSON,
ALLEN, WILSON, GEORGE
& EDGMON, INC.,
3728 Atlantic Avenue,
Long Beach, California 90807,
Counsel for Respondents.

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